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Nontraditional Uniforms Do Accord Prisoner of War Status  
For Special Operations Forces

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## I. Introduction

*Since the collapse of the Berlin Wall, the military force that has been deployed most frequently by the president in response to international crises has been U.S. special operations forces.<sup>1</sup>*

United States Special Operations Forces (SOF) are in high demand.<sup>2</sup> Their ability to deploy "Any Time . . . Any Place"<sup>3</sup> wherever they are needed and accomplish national objectives makes them more effective than the conventional armed forces. Unlike the United States conventional armed forces who operate in a large mass and can be easily recognized in their traditional uniforms, SOF operate in small highly trained units using the element of surprise and may not be as recognizable because they may, in exceptional circumstances, wear nontraditional uniforms.<sup>4</sup>

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<sup>1</sup> SUSAN L. MARQUIS, *UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES* 250 (1997).

<sup>2</sup> William M. Arkin, *Secret Soldiers; Will Our Military Be Dominated By Forces Shielded From Scrutiny?*, *LOS ANGELES TIMES*, June 22, 2003, at M1. Tom Mowman, *Special Forces' Role May Expand*, *BALT. SUN*, Aug. 3 2002, at 9A. See also TOM CLANCY, CARL STINER, & TONY KOLTZ, *SHADOW WARRIORS INSIDE THE SPECIAL FORCES* 513 (Berkley Book 2003) (2002).

<sup>3</sup> Motto of the 16th Special Operations Wing, Hurlburt Field, Florida, available at <http://www.hurlburt.af.mil/index2.shtml>. (last visited June 20, 2003).

<sup>4</sup> Interview with W. Hays Parks, Special Assistant for the Law of War Matters to The Judge Advocate General of the Army, in Washington D.C. (June 20, 2003). (About ninety-five percent of the time SOF wear conventional uniforms).

Examples of this were seen on the news and in photographs shortly after September 11<sup>th</sup> depicting SOF dressed in indigenous clothing riding horseback through the Afghanistan terrain<sup>5</sup> communicating information on the precise location of the Taliban to B-52 bombers flying at 36,000 feet.

Although SOF may be more effective than conventional armed forces for certain missions, the unconventional operational methods of SOF create a chink in their armor not faced by the conventional armed forces. The nontraditional attire worn by SOF while operating in enemy territory, rather than traditional uniforms, arguably result in forfeiture of prisoner of war (POW) status for SOF under the law of war.

Parties to the law of war, "inspired by the desire to diminish the evils of war,"<sup>6</sup> agreed upon rules that govern the conduct of war on land. One of the fundamental rules of the law of war is that combatants are required to distinguish themselves from civilians to spare the latter

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<sup>5</sup> See photograph of SOF riding horseback in Afghanistan during Operation Enduring Freedom, available at <http://www.defenselink.mil/photos/Nov2001/011112-D-0000X-001.html>. (last visited June 20, 2003).

<sup>6</sup> Hague Convention No. IV, Respecting the Laws and Customs of War on Land and Annex Thereto, Oct. 18, 1907, T.S. 539, 36 Stat. 2227.2, 2 A.J.I.L. (1908) Supplement 90-117 (entry into force Jan. 26, 1910, for U.S. Nov. 27, 1909 [hereinafter Hague Regulations]).

from direct attack. Wearing traditional uniforms in combat is one way combatants distinguish themselves, but not the sole means. Being in uniform also provides combatants POW protection for those captured armed forces engaging in spying while in enemy territory.

The law of war implication for SOF operating in nontraditional uniforms is that they are spies. A person who clandestinely or in disguise gathers or attempts to gather information on a targeted country with the intent to communicate it back to his own country is a spy. The law of war distinguishes spies from lawful combatants. A spy who falls into the hands of the enemy is not accorded POW status.<sup>7</sup> The consequences of being declared a spy are serious because historically, armed forces not in uniform captured by the enemy often has resulted in their conviction for espionage and execution.<sup>8</sup>

Wearing a traditional uniform is not the combatant's sole means of distinguishing himself from the civilian population. SOF operating wearing nontraditional uniforms in enemy territory should not be declared spies because

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<sup>7</sup> Hague Regulations, Arts. 29-31, *supra* note 6.

<sup>8</sup> David A. Anderson, Major, USMC, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of its Mandatory Death Penalty*, 127 MIL. L. REV. 1 (1990).

they wear distinctive clothing that distinguishes them from civilian populations.

Part II provides background on SOF<sup>9</sup> and how it differs from the conventional armed forces. The size of the United States' armed forces steadily decreased over the past decade,<sup>10</sup> while the number of military operations significantly increased.<sup>11</sup> The demand for SOF has increased through the years,<sup>12</sup> Congress authorized a doubling in the budget for SOF for new equipment, and SOF are seeking to increase manpower "to 49,000 active and reserve members by the end of" 2004.<sup>13</sup> In the future SOF will play a larger role. Because of the unique

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<sup>9</sup> The information on SOF is not all-inclusive due to the nature of their classified missions and special access programs. There are details that are not appropriate for discussion in this forum.

<sup>10</sup> Department of Defense Almanac, Active Duty Military Personnel Strength Levels, available at <http://www.defenselink.mil/pubs/almanac/> (last visited June 20 2003) (average military end strength in 1990 was 2,079,000, and in 2000 it decreased to 1,373,000).

<sup>11</sup> Department of Defense, Morale and Quality of Life Study (Jun. 13, 2001) (on file with the author) (since 1990 all services have experience increased number of deployments: Navy up 52 percent, Army up 300 percent, Marine Corps up 300 percent, and Air Force up 400 percent).

<sup>12</sup> Heritage of the Quite Professionals, Air Force Special Operations Command, available at <http://www.afsoc.af.mil/history/index1.pdf>. (last visited on June 20, 2003) (list of contingency operations with SOF involvement of the United States since Vietnam: three operations in 1975 beginning with the S.S. Mayaguez to 2002 Operation Enduring Freedom). Although not listed on the contingency operations website, SOF are involved in Operation Iraqi Freedom since Mar. 19, 2003.

<sup>13</sup> Walter Pincus & Dan Morgan, *Congress Supports Doubling Special Operations Funding*, WASH. POST, June 5, 2003, at A31.



capabilities of SOF, they are ideally suited for covert operations.

Part III examines the law of war, specifically the principle of distinction, ruses in war, and POW protections. The law of war authorizes combatants to participate directly in the armed hostilities.<sup>14</sup> Combatants are required to distinguish themselves from civilian populations. Wearing uniforms is one way combatants distinguish themselves from the civilian populations. Ruses in war, however, illustrate that combatants are not always required to wear traditional uniforms.

Part IV explores the law of war implication that missions conducted by SOF wearing nontraditional uniforms is espionage. International law does not prohibit espionage, nor does United States domestic law prohibit espionage against a target country. Espionage is a violation of the domestic law of the country spied on, and it may result in criminal prosecution under the captor's domestic law of a captured combatant not in uniform.

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<sup>14</sup> The 1977 Protocol Additional to the Geneva Convention of 12 Aug. 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8 1977, 1125 U.N.T.S. (1979) 3-608, 16 I.L.M. (1977) 1391-441 (*entry into force* Dec. 7, 1978, U.S. not a party) Art. 43(2), [hereinafter Additional Protocol I].

Part V analyzes the status of captured SOF while conducting special operations. The discussion concludes with an illustration that captured SOF satisfy the principle of distinction and as such should be protected as prisoners of war.

## **II. Special Operations**

### **A. Organization**

In 1987 Congress mandated the creation of the United States Special Operations Command (USSOCOM),<sup>15</sup> and it was formally activated as a unified command at MacDill Air Force Base, Florida, on April 16, 1987.<sup>16</sup> The three military service components of USSOCOM are the Army Special Operations Command,<sup>17</sup> the Air Force Special Operations Command,<sup>18</sup> and the Naval Special Warfare

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<sup>15</sup> 10 U.S.C. § 167. Section 167 was added as part of the 1986 "Goldwater-Nichols" legislation that restructured the Department of Defense.

<sup>16</sup> TOM CLANCY, CARL STINER, & TONY KOLTZ, SHADOW WARRIORS INSIDE THE SPECIAL FORCES 511 (Berkley Book 2003) (2002).

<sup>17</sup> UNITED STATES SPECIAL OPERATIONS FORCES POSTURE STATEMENT 2000 12 (2000) (headquarters located at Fort Bragg, North Carolina).

<sup>18</sup> UNITED STATES SPECIAL OPERATIONS FORCES POSTURE STATEMENT 2000 13 (2000) (headquarters located at Hurlburt Field, Florida).

Command.<sup>19</sup> Army SOF include Special Forces (SF), Special Operations Aviation Regiment (SOAR), Rangers, Psychological Operations (PSYOP) and Civil Affairs (CA) units.<sup>20</sup> Air Force SOF include Air Commandos,<sup>21</sup> which may be divided into two categories: pilots and aircrew, and the Special Tactics Group.<sup>22</sup> Navy SOF include Sea Air and Land (SEAL) teams, SEAL Delivery Vehicle, and Special Boat units.<sup>23</sup>

Special operations "are operations conducted by specially organized, trained, and equipped military and paramilitary forces to achieve military, political, economic, or informational objectives by unconventional military means in hostile, denied, or politically sensitive areas."<sup>24</sup> World events requiring a capability that is clandestine, covert or low visibility repeatedly

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<sup>19</sup> UNITED STATES SPECIAL OPERATIONS FORCES POSTURE STATEMENT 2000 12 (2000) (headquarters located at Coronado, California).

<sup>20</sup> UNITED STATES SPECIAL OPERATIONS FORCES POSTURE STATEMENT 2000 12 (2000).

<sup>21</sup> UNITED STATES SPECIAL OPERATIONS FORCES POSTURE STATEMENT 2000 13 (2000) (comprised of an active special operations wing, two special operations groups, a reserve special operations wing, an air national guard special operations wing and a special tactics group).

<sup>22</sup> SUSAN L. MARQUIS, UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES 55 (1997).

<sup>23</sup> UNITED STATES SPECIAL OPERATIONS FORCES POSTURE STATEMENT 2000 13 (2000).

<sup>24</sup> JOINT CHIEFS OF STAFF PUBLICATION No. 3-05, DOCTRINE FOR JOINT SPECIAL OPERATIONS I-1 (Apr. 17, 1998) [hereinafter JOINT PUB 3-05].

reveal a reliance on SOF to accomplish the missions.<sup>25</sup>

"Since 1987, SOF has become the force of choice for theater CINCs [commander-in-chiefs] and ambassadors; and SOF forces [sic] have been involved in virtually every contingency operation, as well as thousands of joint training exchanges, peacetime engagement activities, and humanitarian relief operations."<sup>26</sup> SOF have this capability because of their specialized combat training<sup>27</sup> and unique equipment.<sup>28</sup>

## **B. Characteristics**

SOF are different from the conventional armed forces in their size, capabilities, and equipment. They are small units of highly organized, trained, and equipped forces whose methods of warfare are unconventional. SOF

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<sup>25</sup> United States raid to rescue of prisoners of war at Son Tay prison near Hanoi, North Vietnam in November 1970 and the rescue attempt of hostages held by Iran in April 1980.

<sup>26</sup> TOM CLANCY, CARL STINER, & TONY KOLTZ, *SHADOW WARRIORS INSIDE THE SPECIAL FORCES* 521 (Berkley Book 2003) (2002).

<sup>27</sup> See Department of Defense Press Release, Special Briefing on Special Operations Forces Capabilities, Dec. 12, 2001, available at [http://www.defenselink.mil/news/Dec2001/t12122001\\_t1212sof.html](http://www.defenselink.mil/news/Dec2001/t12122001_t1212sof.html) (last visited Feb. 21, 2003) (on file with the author).

<sup>28</sup> SOF requires "weapons and equipment not standard for other Department of Defense" forces. JOINT PUB 3-05, *supra* note 24, at I-4.

represent approximately three percent<sup>29</sup> of the total armed forces in the United States. Although small as compared to the conventional armed forces, SOF have a tremendous global span. "In an average week, nearly 5,300 SOF personnel were deployed in 64 countries or foreign territories."<sup>30</sup>

SOF tactics, techniques, procedures, and equipment are unlike the conventional armed forces, which allow SOF to do missions the conventional armed forces are not prepared or capable of performing.<sup>31</sup> Congress identified SOF missions in Title 10 United States Code Section 167(j).<sup>32</sup> Because they operate in small units, SOF logistical support is extremely small, which permits a

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<sup>29</sup> Appendix D Budget and Manpower cited the total manpower end strength of SOF for fiscal year 2000 is 45,741 and for fiscal year 2001 is 45,690. UNITED STATES SPECIAL OPERATIONS FORCES POSTURE STATEMENT 2000 93 (2000). See also *supra* note 10 for total end strength of armed forces for 2000.

<sup>30</sup> WILLIAM S. COHEN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS ch. 3, at 36 (2001).

<sup>31</sup> See JOINT PUB 3-05, *supra* note 24, at vii (deployment of SOF does not entail the degree of political liability or risk of escalation associated with conventional forces). See also William M. Arkin, *Secret Soldiers; Will Our Military Be Dominated By Forces Shielded From Scrutiny?*, LOS ANGELES TIMES, June 22, 2003, at M1 (discussing authorized use of foreign territory by SOF that foreign governments denied use to United States conventional forces).

<sup>32</sup> Special operations activities include each of the following insofar as it relates to special operations: (1) Direct action. (2) Strategic reconnaissance. (3) Unconventional warfare. (4) Foreign internal defense. (5) Civil affairs. (6) Psychological operations. (7) Counterterrorism. (8) Humanitarian assistance. (9) Theater search and rescue. (10) Such other activities as may be specified by the President or the Secretary of Defense.

rapid deployment capability with virtually no advanced warning.<sup>33</sup> One of SOF many unique skills is their High Altitude Low Opening (HALO)<sup>34</sup> and High Altitude High Opening (HAHO)<sup>35</sup> parachute jumps. They jump into austere and unimproved locations. SOF must be in excellent physical fitness to meet the rigorous requirements of special operations.

Operating in conditions and in environments that conventional forces do not requires modifications to SOF aircraft, such as sophisticated radars, avionics, and sensors that permits SOF to fly low and undetected. SOF have all weather,<sup>36</sup> day and night capability,<sup>37</sup> and operate

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<sup>33</sup> AIR FORCE DOCTRINE DOCUMENT 2-7, SPECIAL OPERATIONS 6 (July 17, 2001).

<sup>34</sup> SPECIAL OPERATIONS FORCES REFERENCE MANUAL, ch. 5, available at [http://www.fas.org/irp/agency/dod/socom/sof-ref-2-1/SOFREF\\_Ch5.htm](http://www.fas.org/irp/agency/dod/socom/sof-ref-2-1/SOFREF_Ch5.htm). (last visited June 20, 2003) [hereinafter SPECIAL OPERATIONS FORCES REFERENCE MANUAL, ch. 5] (HALO airdrops are made above 3000 feet above ground level where a freefall is planned prior to parachute opening).

<sup>35</sup> SPECIAL OPERATIONS FORCES REFERENCE MANUAL, ch. 5, *supra* note 34 (High Altitude High Opening (HAHO) airdrops are normally made above 10,000 feet above ground level, but with no freefall, in order to travel long distances).

<sup>36</sup> Air Force Special Operations Command, AFSOC's Aircraft, available at <http://www.afsoc.af.mil/overview/> (last visited June 20, 2003). Combat Talon I and II, MC-130E/H, and Pave Low, MH53J/H provide day and night, adverse weather capability.

<sup>37</sup>The 160<sup>th</sup> Special Operations Aviation Regiment (SOAR) focus is on night operations. HQ U.S. Army Special Operations Command, at Night Stalkers 160th SOAR, available at <http://www.soc.mil/> (last visited June 20, 2003).

in politically sensitive<sup>38</sup> and denied areas.<sup>39</sup> They have special communications equipment that provides them global communication access in hostile environments and are equipped with weapons from throughout the world, as well as other specialized equipment.<sup>40</sup>

Along with a host of unique equipment facilitating SOF operating where conventional forces do not, are their nontraditional uniforms, the wearing of which is usually the exception, rather than standard procedure. The exception was the procedure during a portion of Operation Enduring Freedom due to the request from Northern Alliance leaders.<sup>41</sup> The nontraditional uniform worn by SOF in support of the Northern Alliance "included the Massoud *pakol* (a round brownish-tan or gray wool cap) and Massoud checkered scarf."<sup>42</sup> SOF also grew beards and long hair. The purpose for this attire was to lower visibility of SOF

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<sup>38</sup> Air Force Special Operations Command, AFSOC's Aircraft, available at <http://www.afsoc.af.mil/overview/>. (last visited June 20, 2003) Air Force Special Operations Command Combat Shadow flies clandestine, low level missions penetrating politically sensitive areas.

<sup>39</sup> Air Force Special Operations Command, AFSOC's Aircraft, available at <http://www.afsoc.af.mil/overview/> (last visited June 20, 2003). Pave Low, MH53J/H, flies undetected penetration into denied areas.

<sup>40</sup> DAVID BOHRER, *AMERICA'S SPECIAL FORCES* 88-91 (2002).

<sup>41</sup> W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms In the War on Terrorism*, U.S. NAV. WAR COLL. (forthcoming June 2003) (manuscript at 3, on file with author) (in southern Afghanistan, SOF abandoned wearing the indigenous attire after three days).

<sup>42</sup> *Id.*

supporting the Northern Alliance, not to appear as the local civilians nor blend in with the civilian populations.<sup>43</sup>

### **C. Training**

SOF are volunteers from the conventional armed forces, who first must pass an extensive assessment, selection, and training program that is extremely demanding both physically and mentally, and lengthy as compared to the training of the conventional armed forces. The training simulates combat environments through sleep deprivation, lack of food, and stressful conditions. The attrition rating for the initial training of each of the SOF components is high.<sup>44</sup>

Army Ranger and Special Forces training is challenging; spanning diverse environments from jungle to mountain to swamplands.<sup>45</sup> The physical challenges, on average, result in Ranger students losing 30 pounds in

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<sup>43</sup> *Id.*

<sup>44</sup> SUSAN L. MARQUIS, UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES 47 (1997); DAVID BOHRER, AMERICA'S SPECIAL FORCES 17, 48 (2002). Tom Mowman, *Special Forces' Role May Expand*, BALTIMORE SUN, Aug. 3 2002, at 9A.

<sup>45</sup> DAVID BOHRER, AMERICA'S SPECIAL FORCES 48 (2002).



two months of training.<sup>46</sup> In February 1995, four Ranger students died during their swamplands training because of the harsh environments.<sup>47</sup> The attrition rating for Rangers is approximately sixty-five percent.<sup>48</sup>

Basic Underwater Demolition/SEAL (BUD/S), the Navy SEAL training, is lengthy and demanding too.<sup>49</sup> To prepare for the twenty-five week long BUD/S training, which is divided into three phases, a volunteer undergoes a seven-week pretraining conditioning course first.<sup>50</sup> After that begins the first phase of BUD/S consisting of eight weeks of stressful physical conditioning that increases the level of stress each week.<sup>51</sup> The most demanding week of BUD/S, designed to push the SEAL trainees to their maximum capability, is the final week, known as "Hell Week."<sup>52</sup> The

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 59.

<sup>48</sup> DAVID BOHRER, *AMERICA'S SPECIAL FORCES* 48 (2002); Tom Mowman, *Special Forces' Role May Expand*, *BALT. SUN*, Aug.3 2002, at 9A.

<sup>49</sup> SUSAN L. MARQUIS, *UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES* 48 (1997); DAVID BOHRER, *AMERICA'S SPECIAL FORCES* 17 (2002).

<sup>50</sup> SUSAN L. MARQUIS, *UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES* 48 (1997).

<sup>51</sup> DAVID BOHRER, *AMERICA'S SPECIAL FORCES* 17 (2002).

<sup>52</sup> SUSAN L. MARQUIS, *UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES* 49 (1997) (trainees are deprived of food and sleep, receiving roughly six hours of sleep for the whole week, and upon the conclusion of the first phase, a trainee completes phase two, three, and a six to eighteen month probationary period.); DAVID BOHRER, *AMERICA'S SPECIAL FORCES* 17 (2002).

attrition rating for BUD/S is approximately seventy percent.<sup>53</sup>

The counterparts to the Rangers, Special Forces, and SEALs are members of the Air Force Special Tactics Group, the Combat Control Team (CCT), also known as combat controllers.<sup>54</sup> CCT training consists of "two years of some of the most challenging training in the U.S. military . . . they [CCTs] attend Air Traffic Control school, Army Airborne school, Survival school, Combat Control school, Scuba school, and High Altitude Low Opening jump school."<sup>55</sup> The attrition rating for special tactics is approximately seventy-seven percent.<sup>56</sup>

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<sup>53</sup> SUSAN L. MARQUIS, *UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES* 47 (1997); DAVID BOHRER, *AMERICA'S SPECIAL FORCES* 17 (2002); Tom Mowman, *Special Forces' Role May Expand*, BALT. SUN, Aug.3 2002, at 9A.

<sup>54</sup> DOD Dictionary of Military Terms available at <http://www.dtic.mil/doctrine/jel/doddict/> (last visited June 20, 2003)  
Combat Control Team:

A small task organized team of Air Force parachute and combat diver qualified personnel trained and equipped to rapidly establish and control drop, landing, and extraction zone air traffic in austere or hostile conditions. They survey and establish terminal airheads as well as provide guidance to aircraft for airlift operations. They provide command and control, and conduct reconnaissance, surveillance, and survey assessments of potential objective airfields or assault zones. They also can perform limited weather observations and removal of obstacles or unexploded ordinance with demolitions.

<sup>55</sup> 720<sup>th</sup> Special Tactics Group [720<sup>th</sup> STG] "First There", available at <http://www.globalsecurity.org/military/agency/usaf/720stg.htm>. (last visited June 20, 2003) (on file with the author).

<sup>56</sup> DAVID BOHRER, *AMERICA'S SPECIAL FORCES* 103 (2002).

SOF are not only in excellent physical fitness, they are also mentally fit for the global challenges. SOF maintain proficiency in a number of foreign languages,<sup>57</sup> and receive regional cultural awareness skills.<sup>58</sup> In Joint Combined Exchange Training (JCET) programs, SOF deploy to foreign countries and train with the host nation's troops.<sup>59</sup> JCET provides invaluable opportunities to maintain SOF's regional cultural skills and high operational proficiency.

#### **D. Increase Effectiveness and Efficiency**

SOF have a synergistic affect when used with the conventional forces, and they help shape the battlefield.<sup>60</sup> In the Annual Defense Report to the President and the Congress, Secretary of Defense William Cohen said SOF "act as force multipliers in support of conventional forces engaged in major conflicts, increasing the effectiveness

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<sup>57</sup> UNITED STATES SPECIAL OPERATIONS FORCES POSTURE STATEMENT 2000 8 (2000).

<sup>58</sup> JOINT PUB 3-05, *supra* note 24.

<sup>59</sup> UNITED STATES SPECIAL OPERATIONS FORCES POSTURE STATEMENT 2000 9 (2000).

<sup>60</sup> AIR FORCE DOCTRINE DOCUMENT 2-7, SPECIAL OPERATIONS 6 (July 17, 2001). See also WILLIAM S. COHEN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS ch. 18, at 193 (Apr. 1997); WILLIAM S. COHEN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS ch. 4, at 51 (Apr. 1998).

and efficiency of the U.S. military effort."<sup>61</sup> SOF demonstrated this in the opening of the 1991 Persian Gulf War. SOF Pave Low helicopters guided the conventional armed forces to the attack on Iraq's air defense radar sites, opening the air route for the conventional air force to penetrate Iraqi air space. Retired Lieutenant Colonel William LeMenager, who flew the first sortie of Operation Desert Storm, said, "We led U.S. Army 101<sup>st</sup> Airborne Division (AH-64) 'Screaming Eagle' Apaches into Iraq. They couldn't have gotten to the target without us, and together we took out the first targets of the war."<sup>62</sup>

In Operation Enduring Freedom, SOF proved again that they increase the effectiveness and efficiency of the United States' armed forces. Secretary of Defense Donald Rumsfeld said, "the war in Afghanistan has underscored the critical contributions that Special Operations Forces make in achieving national objectives."<sup>63</sup> Combat Controllers from the 23<sup>rd</sup> and 24<sup>th</sup> Special Tactics Squadrons infiltrated

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<sup>61</sup> WILLIAM S. COHEN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS ch. 18, at 193 (Apr. 1997).

<sup>62</sup> Dennis Brewer, Technical Sergeant, USAF, *Operation Desert Storm MH-53J Pave Low Pilot Retires*, AFSOC NEWS SERVICE NIGHTFLYER, NFNS 03-04 (Jan. 13, 2003), available at <http://www.afsoc.af.mil/nightflyer/> (last visited June 18, 2003) (on file with the author).

<sup>63</sup> DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS ch. 5, at 62 (2002).

by HALO parachute jumps into Afghanistan.<sup>64</sup> "One controller, . . . arrived in Afghanistan on Oct. 21 and called in airstrikes for 25 straight days, averaging 10 to 30 per day."<sup>65</sup> One of their missions was to call in close air support strikes against the Taliban and al Qaeda. Combat controllers spotted "targets from horseback using laptops and laser goggles"<sup>66</sup> equipped with Global Positioning System receivers to call in air strikes from B-52 bombers and F-16 fighters. Conventional air force pilots avoided the danger of enemy air defenses by flying at high altitudes. Combat controllers are at a greater risk than the conventional air force pilots because they are often working in enemy territory while calling in air strikes.

In Operation Iraqi Freedom, SOF entered Iraq well over a month before hostilities occurred, "laying the groundwork for conventional U.S. forces . . . ."<sup>67</sup> As it was in the 1991 Persian Gulf War, in Operation Iraqi

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<sup>64</sup> Tamar A. Mehuron, *The Outstanding Airmen*, AIR FORCE ASS'N AIR FORCE MAG., Nov. 2002, at 86.

<sup>65</sup> Vernon Loeb, *An Unlikely Super-Warrior Emerges in Afghan War; U.S. Combat Controllers Guide Bombers to Precision Targets*, WASH. POST, May 19, 2002, at A16.

<sup>66</sup> Ann Scott Tyson, *Elite Air Force Scouts Brave Friendly Fire, Runaway Horses*, THE CHRISTIAN SCIENCE MONITOR, Mar. 27, 2002 at USA1.

<sup>67</sup> Thomas E. Ricks, *Special Operations Units Already in Iraq*, WASH. POST, Feb. 13, 2003, at A1.

Freedom SOF led the way into Iraq. On March 19, 2003, Wednesday night, 300 SOF infiltrated into western and southern Iraq, joining up with other SOF and paramilitaries already present, two days before the start of the massive air campaign.<sup>68</sup> Their direct action mission was to sever the Iraqi military communications, creating chaos and confusion, and to seize airfields in western Iraq.<sup>69</sup>

#### **E. Special Activities**

Besides SOF support to the conventional armed forces, there are particular missions, low visibility, clandestine, or covert operations, which are ideally suited for SOF. Congress delegated the power to conduct covert operations to the President when he determines that it "is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States, . . . ."<sup>70</sup> After the President makes a determination to conduct covert

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<sup>68</sup> Bob Woodward, *Attack Was 48 Hours Old When It 'Began'*, WASH. POST, Mar. 23, 2003, at A1.

<sup>69</sup> *Id.*

<sup>70</sup> 50 U.S.C. § 413b(a) (2003).

operations, he is required to sign a written finding.<sup>71</sup> Covert action "means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, . . . ." <sup>72</sup> Another name for covert action is "special activities."<sup>73</sup>

Normally, the CIA conducts special activities, but if "the President determines that another agency is more likely to achieve a particular objective"<sup>74</sup> he may task it. The President may task SOF to conduct special activities,<sup>75</sup> thereby giving the United States Government plausible deniability. Success of SOF special activities depends largely on the element of surprise and the frequent use of deception.<sup>76</sup> SOF infiltration into a hostile country will be executed in a manner that conceals them. To remain concealed during the mission, SOF may not be wearing

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<sup>71</sup> *Id.*

<sup>72</sup> 50 U.S.C. § 413b(e) (2003).

<sup>73</sup> Executive Order 12333, § 3.4, 46 Fed. Reg. 59941 (1981), 3 C.F.R. 200 (1982) [hereinafter EO 12333]. "Special activities means activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent, or acknowledged publicly . . . ."

<sup>74</sup> *Id.* at § 1.8(e).

<sup>75</sup> JOINT PUB 3-05, *supra* note 24, at viii and II-13.

<sup>76</sup> JOINT PUB 3-05, *supra* note 24, at I-5.

traditional uniforms; instead, they may be dressed in subdued uniforms with no indicia of rank, service, or nationality or in "civilian clothes."<sup>77</sup> The issue is whether SOF conducting these missions wearing nontraditional uniforms may, under the law of war, be denied prisoner of war (POW) status if they are captured.

### **III. International Law of War**

#### **A. Sources of International Law**

International conventions, international customs, and general principles of law recognized by civilized nations<sup>78</sup> are "generally regarded as a complete statement of the sources of international law."<sup>79</sup> International conventions or treaties are bilateral or multilateral agreements between states under which states expressly consent to conduct their relationships with each other according to the terms of the convention or treaty. The Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between States in

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<sup>77</sup> SUSAN L. MARQUIS, UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES 4 (1997).

<sup>78</sup> The Statute of the International Court of Justice, Art. 38(1).

<sup>79</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (5th ed. 1998).



written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."<sup>80</sup> A treaty is a contract between states, which governs how the states interact with each other.

A second source of international law, international custom, develops from consistent practice of states, when the practice is accomplished under a sense of a legal obligation, *opinio juris*.<sup>81</sup> A distinct difference between treaties and customary international law is that the latter can be binding on all states without their consent, except for states that persistently object. A third source of international law is general principles of law recognized by civilized nations.<sup>82</sup> They are principles recognized in the domestic law of all civilized states, such as *res judicata*, estoppel, justice and equity.<sup>83</sup> General principles are not derived from consent of states.

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<sup>80</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980.

<sup>81</sup> See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-7 (5th ed. 1998).

<sup>82</sup> *Id.* at 15.

<sup>83</sup> *Id.* at 17-18.

## B. Customary Humanitarian Law

Most societies, going back to ancient times, have had some type of rules on armed conflict. Egypt made agreements on the treatment of prisoners of war around the year 1400 B.C.<sup>84</sup> The Code of Hammurabi promulgated by the King of Babylon provided that "the strong shall not oppress the weak" and promised to treat the conquered people justly.<sup>85</sup> Islamic societies recognized that civilians should be spared the harshness of war. The first caliph of Islam, Abu Bakr (632-634),<sup>86</sup> issued an order to his commanders: "The blood of women, children and old people shall not stain your victory. Do not destroy a palm tree, nor burn houses and cornfields with fire, and do not cut any fruitful tree. You must not slay any flock or herds, save for your subsistence."<sup>87</sup>

The modern rules, known as the law of war or law of armed conflict, have their history in medieval Europe. At

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<sup>84</sup> INGRID DETTER, *THE LAW OF WAR* 151 (2<sup>d</sup> ed. 2000) (1987).

<sup>85</sup> See ROBERT FRANCIS HARPER, PH.D., *THE CODE OF HAMMURABI KING OF BABYLON ABOUT 2250 B.C.* 99 reprinted by WM. W. Grant & Sons Inc. (1994); See also, Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 12 (Dieter Fleck ed., 1995).

<sup>86</sup> CAESAR E. FARAH, PH.D., *ISLAM BELIEF AND OBSERVANCES* 97 (7<sup>th</sup> ed. 2003).

<sup>87</sup> Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 14 (Dieter Fleck ed., 1995).

that time, there were two particular root sources of the law of war. One source was the customary law of arms developed by the noble class and knights through the principles of chivalry. The second source was the canon law of the church beginning in 500 A.D. The church, concerned by the state of violence in war, espoused principles for the protection of women, children, and the elderly from hostilities.<sup>88</sup>

Another advocate and writer for "more humane practices" of civilian populations affected by war was Hugo Grotius.<sup>89</sup> He is arguably "the earliest modern writer on the law of war" who published in 1625 *De Jure Belli ac Pacis*.<sup>90</sup> "It is in these writings that we find much of the evidence as to what now constitutes the customs of war and the customary law regarding armed conflict."<sup>91</sup>

### **C. Evolution of the Law of War**

The evolution of the law of war progressed significantly in the late 1800's. At the Battle of

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<sup>88</sup> *Id.*

<sup>89</sup> Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, at 86 (2003).

<sup>90</sup> LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 1 (2d ed., 2000).

<sup>91</sup> *Id.* at 28.

Solferino in 1859, Henri Dunant witnessed the plight of 40,000 wounded soldiers on the battlefield.<sup>92</sup> Many wounded soldiers died on the battlefield because there was no mechanism for the armies to recover their wounded. In 1863, Henri Dunant founded the International Committee of the Red Cross (ICRC) in Geneva, Switzerland to provide better medical care for soldiers wounded in battle.<sup>93</sup> The ICRC was the impetus for creating an international agreement to care for the wounded, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The 1864 Geneva Convention required the collection and treatment of wounded enemy soldiers.<sup>94</sup>

In America in 1863, Doctor Francis Lieber, "a highly regarded German immigrant law professor,"<sup>95</sup> worked to bring order to war. Appointed to a special board, Doctor Lieber assisted the Union Army during the American Civil War in writing a code of regulations for the army.<sup>96</sup> On April 24,

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<sup>92</sup> Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 18 (Dieter Fleck ed., 1995).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 2 (1983).

<sup>96</sup> *Id.* at 14.

1863, President Lincoln approved the final draft General Orders, No. 100: Instructions for the Government of Armies of the United States in the Field,<sup>97</sup> also known as the Lieber Code. Although meant as a guide for an internal conflict in the United States, the Lieber Code had a "profound effect on the international law of land warfare."<sup>98</sup> In the years shortly following the Lieber Code, similar "codes were issued by Prussia, 1870; The Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Servia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893."<sup>99</sup> Examination of the 1899 Hague Convention II with Respect to the Laws and Customs of War on Land and its successor, the 1907 Hague IV bearing the same title, reveals the considerable influence of the Lieber Code.

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<sup>97</sup> *Id.* at 15. Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, reprinted in RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 45 (1983) [hereinafter *LIEBER CODE*].

<sup>98</sup> RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 1 (1983) ("The governments of Prussia, France and Great Britain copied it.").

<sup>99</sup> LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 30 (2d ed., 2000).

#### D. International Conventions on the Law of War

Today a collective body of international law,<sup>100</sup> known as the law of war, regulates the means and methods of warfare and provides protection for victims of war. The genesis of the modern law of war can be traced to the Saint Petersburg Declaration of 1868.<sup>101</sup> Although only one page long and created for the purpose of prohibiting the use of explosive bullets, the notable provision is in the preamble in which nineteen states declared:

Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

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<sup>100</sup> Hague Convention No. IV, Respecting the Laws and Customs of War on Land and Annex Thereto, Oct. 18, 1907, T.S. 539, 36 Stat. 2227.2, 2 A.J.I.L. (1908) Supplement 90-117 (entry into force Jan. 26, 1910, for U.S. Nov. 27, 1909 [hereinafter Hague Regulations]; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, adopted Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. (1950) 31-83 1949 (entry into force Oct. 21, 1950, for U.S. Feb. 2, 1956) [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. (1950) 85-133 1949 (entry into force Oct. 21, 1950, for U.S. Feb. 2, 1956) [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, adopted Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. (1950) 135-285 1949 (entry into force Oct. 21, 1950, for U.S. Feb. 2, 1956) [hereinafter Geneva Convention III]; and the 1977 Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted Jun. 8 1977, 1125 U.N.T.S. (1979) 3-608, 16 I.L.M. (1977) 1391-441 (entry into force Dec. 7, 1978, U.S. not a party) [hereinafter Additional Protocol I].

<sup>101</sup> See Prefatory Note, *Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles under 400 Grammes Weight*, reprinted in DOCUMENTS ON THE LAWS OF WAR 54 (Adam Roberts & Richard Guelff ed., 3d ed. 2000) (1982).

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;<sup>102</sup>

Other international agreements limiting the means of warfare soon followed the Saint Petersburg Declaration. Fifteen European states gathered for a conference in Brussels in 1874<sup>103</sup> where they drafted fifty-six articles, known as the *Project of an International Declaration concerning the Laws and Customs of War*.<sup>104</sup> The Brussels Declaration of 1874 echoed the language in the Lieber Code and the Geneva Convention of 1864. Although this declaration was never ratified,<sup>105</sup> it influenced many of

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<sup>102</sup> *Id.* at 55.

<sup>103</sup> LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 31 (2d ed., 2000); See also Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, at 88 (2003).

<sup>104</sup> Project of an International Declaration concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, Art. 13(f) [hereinafter Declaration of Brussels], reprinted in DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICT* 29 (2d rev. ed. 1981).

<sup>105</sup> DOCUMENTS ON THE LAWS OF WAR 243 (Adam Roberts & Richard Guelff ed., 3d ed. 2000) (1982).

the subsequent international agreements on the laws and customs of war.<sup>106</sup>

In 1899 twenty-six countries met at the First Hague Peace Conference and "adopted Conventions and Declarations which underlie that part of the law of armed conflict still known as the Law of The Hague."<sup>107</sup> At the Second Hague Peace Conference of 1907, forty-four states attended.<sup>108</sup> The conference resulted in the adoption of thirteen conventions and one declaration on the laws of war.<sup>109</sup> The First World War revealed inadequacies in these past conventions on the treatment of prisoners of war, which led to the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.<sup>110</sup> The events of the Second World War "also confirmed the need to revise and extend the law of war."<sup>111</sup> From 1945 through 1948, experts from various states met, consulted, and drafted conventions

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<sup>106</sup> Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, at 88 (2003).

<sup>107</sup> LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 33 (2d ed., 2000).

<sup>108</sup> DOCUMENTS ON THE LAWS OF WAR 67 (Adam Roberts & Richard Guelff ed., 3d ed. 2000) (1982).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 243.

<sup>111</sup> *Id.* at 195.



that ultimately evolved into the four Geneva Conventions of 1949.<sup>112</sup>

After the Second World War, warfare changed by increased use of unconventional or guerrilla tactics by resistance groups.<sup>113</sup> It was argued by some that these groups were not adequately protected in the 1949 Geneva Conventions because they did not meet the criteria of who is legally authorized to fight in an armed conflict.<sup>114</sup> The Swiss government convened a Diplomatic Conference that met from 1974 to 1977, leading to the 1977 Additional Protocols I and II to the 1949 Geneva Conventions.<sup>115</sup> The relevant provisions on the issue of the status of SOF in nontraditional uniforms captured by the enemy are in the Hague Regulations of 1907, the four Geneva Conventions of 1949, and Additional Protocol I of 1977.

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 419.

<sup>114</sup> George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 43 (Jan. 2000). (being commanded by one responsible for subordinates, having a fixed and distinctive emblem recognizable at a distance, carrying arms openly, and complying with the laws and customs of war).

<sup>115</sup> DOCUMENTS ON THE LAWS OF WAR 419 (Adam Roberts & Richard Guelff ed., 3d ed. 2000) (1982).

## **E. Combatants**

The law of war recognizes three groups in combat: combatants, non-combatants and civilians.<sup>116</sup> Combatants are members of the armed forces who are authorized to participate directly in armed hostilities<sup>117</sup> against another state. Non-combatants, generally are those individuals who are members of the armed forces who are medical personnel or chaplains.<sup>118</sup> The third group consists of the civilian population, or individual civilians not taking a direct or active part in hostilities.

The Hague Regulations and the Geneva Convention Relative to the Treatment of Prisoners of War define who are combatants and what are their rights and obligations. Article 1 of the Annex to the 1907 Hague Convention states,

The laws, rights and duties of war apply not only to armies, but also to militia and

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<sup>116</sup> LIEBER CODE, Art. 155, *supra* note 97; Hague Regulation, Art. 3, *supra* note 100; See also Knut Ipsen, *Combatants and Non-combatants*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 66 (Dieter Fleck ed., 1995).

<sup>117</sup> Additional Protocol I, Art. 43, para. 2, *supra* note 100.

<sup>118</sup> Geneva Convention I, Arts. 28, 30; Geneva Convention II, Arts. 36, 37; Geneva Convention III, Art. 33, and Additional Protocol I, Art. 43, *supra* note 100. See also Knut Ipsen, *Combatants and Non-combatants*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 88 (Dieter Fleck ed., 1995).

volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.<sup>119</sup>

These criteria are inherent qualities of armed forces, whereas militia and volunteer corps are required to satisfy them to be a lawful combatant.<sup>120</sup> The Hague Regulations recognized that combatants and non-combatants "have a right to be treated as prisoners of war."<sup>121</sup> The Geneva Convention III did not change the criteria of POW status from that in the Hague Regulations.<sup>122</sup> Additional Protocol I modified the requirement of having a "fixed distinctive emblem recognizable at a distance" with a requirement that combatants distinguish themselves from civilians when attacking or in preparation for attack.<sup>123</sup> When combatants are not able to distinguish themselves from civilians, they still retain status of combatants and

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<sup>119</sup> Hague Regulations, Art. 1, *supra* note 100.

<sup>120</sup> See George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 at 895 (Oct. 2002).

<sup>121</sup> Hague Regulations, Art. 3, *supra* note 100.

<sup>122</sup> Geneva Convention III, Art. 4A(1) & (2), *supra* note 100.

<sup>123</sup> Additional Protocol I, Art. 43 & 44, para. 3, *supra* note 100.

do not forfeit POW status, provided they carry arms openly.<sup>124</sup>

Although the law of war defines who are combatants, there is no definition in the law of war of what constitutes a uniform.<sup>125</sup> The view that uniforms are required to be worn by combatants to avoid violating the law of war is an erroneous interpretation<sup>126</sup> to Article 44(7), which states that "[t]his Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict."<sup>127</sup> W. Hays Parks, Special Assistant for Law of War Matters to The Judge Advocate General of the Army, noted "State practice and the negotiating record of relevant treaties support the wearing of non-standard uniforms by some, but not all, special operations forces,

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<sup>124</sup> Additional Protocol I, Art. 44, paras. 3 & 4, *supra* note 100.

<sup>125</sup> W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms In the War on Terrorism*, U.S. NAV. WAR COLL. (forthcoming June 2003) (manuscript at 10, on file with author).

<sup>126</sup> See Michael Bothe, Karl Josef Partsch, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS*, 256-257 (1982) (recognizing situations that are not violations of the law of war when a combatant cannot distinguish himself). See also Howard S. Levie, ed. *PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS*, vol. 2:475 (1980).

<sup>127</sup> Additional Protocol I, Art. 43, para. 7, *supra* note 100.

for certain missions or circumstances."<sup>128</sup> Mr. Parks pointed out that within the Working Group of Additional Protocol I concerns arose that Article 44 might encourage the wearing of civilian clothing by uniformed regular armed forces.<sup>129</sup> In spite of these concerns, the Working Group recognized circumstances where regular armed forces are not required to wear the uniform.<sup>130</sup> The ICRC Commentary on the Additional Protocol I states:

Regulars who are assigned to tasks where they must wear civilian clothes, as may be the case, for example, with advisers assigned to certain resistance units, are not required to wear the uniform when on such assignments. This means that the possibility for a combatant to distinguish himself from the civilian population solely by carrying arms openly, also exists for members of the regular armed forces, though only under the same exceptional circumstances as for members of so-called guerrilla forces.<sup>131</sup>

#### **F. Principle of Distinction**

The purpose of the principle of distinction<sup>132</sup> is to spare civilians from attack. The intent of Additional

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<sup>128</sup> W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms In the War on Terrorism*, U.S. NAV. WAR COLL. (forthcoming June 2003) (manuscript at 10, on file with author).

<sup>129</sup> *Id.* at 12.

<sup>130</sup> *Id.* at 12 n.16.

<sup>131</sup> International Committee of the Red Cross Commentary on Additional Protocol I, Art. 44, 532.

<sup>132</sup> Codified in part, at Additional Protocol I, Art. 51, para. 2, *supra* note 100.

Protocol I is to strengthen the POW status for irregular forces or guerrilla forces.<sup>133</sup> Under the Hague Regulations Article 2 and the Geneva Convention III Article 4, it is difficult for guerrilla forces to meet the requirements of "having a fixed distinctive sign recognizable at a distance" because they usually fight without wearing uniforms. Additional Protocol I eliminated the requirement of "having a fixed distinctive sign recognizable at a distance," so long as these combatants carry their arms openly while attacking the enemy or preparing to attack.<sup>134</sup> The distinguishing act for guerrilla forces in Additional Protocol I is the act of carrying arms openly, rather than wearing uniforms. If captured, whether or not the guerrilla forces are wearing uniforms, they are nevertheless entitled to POW status, so long as they carry their arms openly.<sup>135</sup>

A uniform is an ideal way to distinguish combatants from non-combatants, but it is not the only way. Rather than solely interpreting Article 44(7) of Additional Protocol I as requiring combatants to wear uniforms, the

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<sup>133</sup> See International Committee of the Red Cross Commentary on the Additional Protocol, Art. 44, 522.

<sup>134</sup> Additional Protocol I, Art. 44, para. 3, *supra* note 100.

<sup>135</sup> George H. Aldrich, *Guerrillas Combatants and Prisoner of War Status*, 31 AM. U. L. REV. 871 (1982).

logical argument is that Article 44(7) reinforces the principle of distinction. The absence of mandatory language, such as combatants shall forfeit their POW status when they fail to wear uniforms, weighs against the view of a mandatory requirement to wear uniforms to retain POW status. The issue is that a combatant must be distinguishable when attacking or in preparation of attack, so the enemy knows who is friend or foe.<sup>136</sup>

#### **G. Use of Disguises by Combatants Not In Combat**

The Lieber Code recognized that it was permissible to wear captured enemy uniforms in war.<sup>137</sup> In combat, the Lieber Code required "[t]roops who fight in the uniform of their enemies"<sup>138</sup> to mark the enemy's uniform with "some striking mark or sign . . . to distinguish the American soldier from the enemy."<sup>139</sup> Soldiers fighting while wearing the enemy's uniform without a distinguished mark

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<sup>136</sup> 2 OPPENHEIM, INTERNATIONAL LAW, 7TH ED. § 164 at 429 (H. Lauterpacht, ed. 1952).

<sup>137</sup> LIEBER CODE, Art. 64, *supra* note 97.

<sup>138</sup> LIEBER CODE, Art. 63, *supra* note 97.

<sup>139</sup> LIEBER CODE, Art. 64, *supra* note 97.

could "expect no quarter,"<sup>140</sup> and this was declared "an act of perfidy by which they lose all claim to the protection of the laws of war."<sup>141</sup> The Lieber Code recognized "deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare,"<sup>142</sup> but deception is not just when the enemy attempts to injure the adversary by clandestine or treacherous ways. The gravamen of the offense of perfidy lies in the actual fighting while wearing the enemy's uniform without distinguishing marks, rather than wearing it while not in combat. An adversary wearing the enemy's uniform when confronting the enemy, would mislead the enemy into the belief there was a situation of protection, rather than one of danger.

The Brussels Declaration of 1874 changed the provision of Lieber's Code on use of the enemy's uniform by stating that it is forbidden to make improper use of the enemy's uniform<sup>143</sup> but never defined what is proper

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<sup>140</sup> LIEBER CODE, Art. 63, *supra* note 97. (soldiers under this circumstance would be denied POW status).

<sup>141</sup> LIEBER CODE, Art. 65, *supra* note 97.

<sup>142</sup> LIEBER CODE, Art. 101, *supra* note 97.

<sup>143</sup> Project of an International Declaration concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, Art. 13(f) [hereinafter Declaration of Brussels], reprinted in DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICT* 29 (2d rev. ed. 1981).



use. The Hague Regulations of 1907 adopted the same language used in the Brussels Declaration.<sup>144</sup> This left open the interpretation that wearing the enemy's uniform was proper use so long as the soldier was not engaged in battle.

The post World War II trial of Colonel Otto Skorzeny arguably supports the proposition that wearing the enemy's uniform was proper use so long as the soldier was not engaged in battle. The War Crimes Commission accused Colonel Skorzeny and nine of his men, who were all members of the 150<sup>th</sup> Panzer Brigade, with violations of the law of war.<sup>145</sup> The specification of the charges were improper use of the enemy's uniforms by entering into combat disguised in the enemy's uniforms, treacherously firing upon and killing the enemy, and participation in wrongfully obtaining the enemy's uniforms from a prisoner-of-war camp.<sup>146</sup>

Hitler commissioned Colonel Skorzeny to organize a special operations force, the 150<sup>th</sup> Panzer Brigade.<sup>147</sup>

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<sup>144</sup> Hague Regulations, Art. 23(f), *supra* note 100.

<sup>145</sup> Trial Of Otto Skorzeny And Other, (United States Gen. Milit. Gov. Ct., Aug. 18<sup>th</sup>-Sept. 9<sup>th</sup>, 1947), IX L. REPT. TRIALS WAR CRIM. 90-92 (U.N. War Crimes Comm'n, 1949).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 91.

Their mission "was to infiltrate through the American lines in American uniform and to capture . . . three Mass bridges at Angier, Amee and Huy respectively."<sup>148</sup> The 150<sup>th</sup> Panzer Brigade consisted of volunteers who spoke English.<sup>149</sup> In preparation for the mission, they received specialized training in English and American cultural orientation and were provided with American weapons and vehicles.<sup>150</sup>

Colonel Skorzeny abandoned the original mission because of failure to penetrate the American lines.<sup>151</sup> Instead, the 150<sup>th</sup> Panzer Brigade assumed "an infantry mission to attack towards Malmedy."<sup>152</sup> At trial, their defense was that they planned to reach their objectives at night while in American uniforms, and once detected, discard these uniforms and fight in their uniforms.<sup>153</sup> The Hague Regulations prohibits the improper use of "the military insignia and uniform of the enemy;"<sup>154</sup> however, it does not prohibit the absolute use of the enemy's uniform,

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 92 See Notes on the Case.

only the improper use.<sup>155</sup> "All accused were acquitted of all charges."<sup>156</sup>

Another example of ruses used by combatants is the disguised British merchant vessels in World War II. The British outfitted merchant vessels with concealed armament and Royal Navy crewmen disguised as merchant mariners.<sup>157</sup> When a German submarine spotted them, the disguised merchant vessel let the German submarine fire on them first.<sup>158</sup> As the German submarine came into range of the merchant vessel, it raised the British battle ensign and attacked the German submarine.<sup>159</sup> The British sank twelve submarines by this method.<sup>160</sup>

These cases illustrate that combatants may lawfully disguise themselves, so long as when engaged in attacks, they are distinguished as combatants. The Colonel Skorzeny trial arguably demonstrated that it was not a

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<sup>154</sup> Hague Regulations, Art. 23(f), *supra* note 100.

<sup>155</sup> 2 OPPENHEIM, INTERNATIONAL LAW, 7TH ED. § 164 at 429 (H. Lauterpacht, ed. 1952).

<sup>156</sup> Trial Of Otto Skorzeny And Other, (United States Gen. Milit. Gov. Ct., Aug. 18<sup>th</sup>-Sept. 9<sup>th</sup>, 1947), IX L. REPT. TRIALS WAR CRIM. 92 (U.N. War Crimes Comm'n, 1949).

<sup>157</sup> LCDR Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, 42 NAV. WAR COLL. REV. 52, at 60 (Summer 1989).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

violation of the law of war to wear the enemy's uniform behind enemy lines. Disguises worn to conceal troop movements are lawful ruses, so long as the true colors are worn during attacks.<sup>161</sup> The facts in the disguised British merchant vessel attacks on German submarines in World War II also demonstrated that it is not a violation of the law of war to be in disguise while not in battle. There the ships and crew were disguised concealing their movements, but the British merchant vessels raised their true colors before attacking.

All military, including SOF, rely on camouflage, a lawful ruse of war,<sup>162</sup> to conceal their movement and location. SOF operating at night may be wearing subdued clothing, rather than traditional uniforms, to camouflage their movements.

There is a significant record of SOF from various nations wearing nontraditional uniforms in international armed conflicts and other military operations as ruses.<sup>163</sup> "Beginning with Colonel T.E. Lawrence, the celebrated

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<sup>161</sup> See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 146 (2d ed., 2000).

<sup>162</sup> Stefan Oeter, *Methods and Means of Combat*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 200 (Dieter Fleck ed., 1995).

<sup>163</sup> W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms In the War on Terrorism*, U.S. NAV. WAR COLL. (forthcoming June 2003) (manuscript at 13, on file with author).

Lawrence of Arabia, State practice reflects a tolerance bordering on admiration for special forces wearing civilian clothing when working with indigenous persons in enemy denied areas, whether for intelligence gathering or combat operations."<sup>164</sup> Examples of State practice of wearing nontraditional uniforms in military operations from 1904 to 1991 have been conducted by the following States: Germany, France, the United Kingdom, Russia, Japan, Australia, the United States, and Indonesia.<sup>165</sup>

#### **H. Perfidy**

Perfidy differs from ruses in war in that perfidy is a breach of faith,<sup>166</sup> whereas ruses are acts that cause the enemy to make mistakes by deliberately deceiving him or that cause the enemy to act imprudently without necessarily using deception.<sup>167</sup> Examples of lawful ruses illustrated by the tactics of Colonel Skorzeny are camouflaging troops and taking advantage of the night, and by the British merchant vessels' surprise attacks on the

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 15-20.

<sup>166</sup> International Committee of the Red Cross Commentary on the Additional Protocol, Art. 37, 430.

<sup>167</sup> *Id.* at 441.

German submarines. Examples of perfidy are combatants pretending to surrender who then attack as they move closer to the adversary, or combatants disguised as civilians to lull the adversary to drop their defenses before attacking them.

Perfidy, codified in Article 23(b) of the Hague Regulations, prohibits the treacherous killing or wounding of the enemy.<sup>168</sup> Article 37 of Additional Protocol I developed the prohibition by narrowly defining perfidy providing a list of perfidious acts.<sup>169</sup> Article 37 states:

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;

(b) the feigning of an incapacitation by wounds or sickness;

(c) the feigning of civilian, non-combatant status; and

(d) the feigning of protected status by the use of signs, emblems or uniforms of the United

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<sup>168</sup> *Id.* at 431.

<sup>169</sup> *Id.*

Nations or of neutral or other States not Parties to the conflict.<sup>170</sup>

The elements of perfidy are inviting the confidence of the enemy, who believes he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.<sup>171</sup> Prohibited disguises are those used by combatants inviting the confidence of the enemy, causing the enemy to believe that he is protected under international law, when combatants intending to betray that confidence to kill, injure, or capture the enemy, and which proximately causes the death, injury, or capture.

Tactics used by the Fedayeen in Operation Iraqi Freedom illustrate perfidy because they were disguised as civilians during the war and attacked United States armed forces after waving white flags pretending to surrender. Created in 1994, the Fedayeen, a militia group formed by Saddam Hussein's son Uday,<sup>172</sup> engaged in guerrilla warfare dressed in black clothing or civilian attire "armed with

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<sup>170</sup> Additional Protocol I, Art. 37, *supra* note 100.

<sup>171</sup> International Committee of the Red Cross Commentary on the Additional Protocol, Art. 37, 435.

<sup>172</sup> Peter Baker, *U.S. Forces Rounding Up Civilian Suspects*, WASH. POST, Mar. 31, 2003, at A1.

rocket-propelled grenades and AK-47 assault rifles."<sup>173</sup>

The clothing worn by the Fedayeen was not distinctive from that worn by the civilian population in the area, thereby allowing the Fedayeen to blend in with them. "A man dressed in civilian clothes drove a car up to a U.S. Army checkpoint near the city of Najaf, waved to soldiers as if seeking help and when they drew near blew up his vehicle."<sup>174</sup> The conduct of the Fedayeen and their attire significantly increased the risk that innocent civilians would be attacked by United States armed forces defending themselves from approaching civilians.

It is a violation of the law of war to deliberately kill, injure, or capture the enemy by using deception to instill the confidence of the enemy with the intent to betray that confidence, when the enemy is entitled to protection under the law of war.<sup>175</sup> It is not perfidy, however, if disguises are used to avoid detection or capture, rather than to kill, wound, or injure.<sup>176</sup>

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<sup>173</sup> Michael R. Gordon, *Allies Adapt To Setbacks*, THE N.Y. TIMES, Mar. 27, 2003, A1.

<sup>174</sup> Peter Baker, *U.S. Authorizes Detention of Iraqi Civilians*, WASH. POST, Apr. 2, 2003, at A23.

<sup>175</sup> See Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 200 (Dieter Fleck ed., 1995).

<sup>176</sup> International Committee of the Red Cross Commentary on the Additional Protocol, Art. 37, 435.



# I. Ex Parte Quirin et. al.

Wearing civilian clothes to avoid detection or capture, German saboteurs were charged with violations of the law of war and executed as a result of a rushed decision by the U.S. Supreme Court that misstates the law by its failure to recognize the lawful use of disguises by combatants.<sup>177</sup> The U.S. Supreme Court held it was a violation of the law of war<sup>178</sup> for "an enemy combatant who without uniform comes secretly through the lines for the purposes of waging war by destruction of life or property, . . . ." <sup>179</sup> The case is unusual not only because the holding misstates the law but also because of the speed in which the case was processed. Within less than two months from landing on the coast, the saboteurs were tried by a military commission, the U.S. Supreme Court ruled on their case, President Franklin D. Roosevelt reviewed the 3000 page record of the military commission, and six of the saboteurs were executed.<sup>180</sup>

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<sup>177</sup> *Ex Parte Quirin et. al.*, 317 U.S. 1 (1942).

<sup>178</sup> *Id.* at 46.

<sup>179</sup> *Id.* at 31.

<sup>180</sup> LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT (Mar. 26, 2002).

Richard Quirin and seven others were German saboteurs who landed along the Atlantic coast of the United States in the summer of 1942. The German armed forces trained them at a camp in Brandenburg, Germany, to sabotage the United States' war efforts by blowing up key war manufacturing plants and transportation infrastructure.<sup>181</sup> They received training "in chemistry, incendiaries, explosives, timing devices, secret writing, and concealment of identity by blending into an American background."<sup>182</sup> Two groups infiltrated the United States coast by German submarines.<sup>183</sup> George John Dasch led one group that consisted of Ernest Peter Burger, Heinrich Harm Heinck, and Richard Quirin.<sup>184</sup> They "landed on a beach near Amagansett, Long Island, New York, about 12:10 a.m.,

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<sup>181</sup> LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 1 (Mar. 26, 2002). Gary Cohen, *The Keystone Kommandos*, THE ATLANTIC MONTHLY, Feb. 2002, at 49.

<sup>182</sup> George John Dasch & The Nazi Saboteurs, available at FBI Library, <http://www.fbi.gov/libref/historic/famcases/nazi/nazi.htm> (last visited May 23, 2003) (on file with the author).

<sup>183</sup> 317 U.S. 1 at 21 (1942).

<sup>184</sup> 317 U.S. 1 at 21 (1942); See also Gary Cohen, *The Keystone Kommandos*, THE ATLANTIC MONTHLY, Feb. 2002, at 50.

June 13, 1942."<sup>185</sup> The second group on June 17, 1942, landed at Ponte Vedra Beach, Florida.<sup>186</sup>

They wore German uniforms as they rowed to shore, however, upon landing Dasch's team changed into civilian clothes and buried the explosives they brought with them.<sup>187</sup> A Coast Guardsman came upon Dasch, who bribed the Coast Guardsman to forget he saw them.<sup>188</sup> Dasch and his men went to New York City and checked into hotel rooms.<sup>189</sup> No sabotage activities were to occur until "[d]etailed instructions would come at noon on July 4, at the Hotel Gibson in Cincinnati."<sup>190</sup>

On the night of June 14, 1942, Dasch telephoned the FBI; he had decided to turn himself in.<sup>191</sup> He told the FBI

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<sup>185</sup> George John Dasch & The Nazi Saboteurs, available at FBI Library, <http://www.fbi.gov/libref/historic/famcases/nazi/nazi.htm> (last visited May 23, 2003) (on file with the author).

<sup>186</sup> 317 U.S. 1 at 21 (1942); George John Dasch & The Nazi Saboteurs, available at FBI Library, <http://www.fbi.gov/libref/historic/famcases/nazi/nazi.htm> (last visited May 23, 2003) (on file with the author).

<sup>187</sup> 317 U.S. 1 at 21 (1942); Gary Cohen, *The Keystone Kommandos*, THE ATLANTIC MONTHLY, Feb. 2002, at 51.

<sup>188</sup> LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 2 (Mar. 26, 2002). Gary Cohen, *The Keystone Kommandos*, THE ATLANTIC MONTHLY, Feb. 2002, at 51.

<sup>189</sup> Gary Cohen, *The Keystone Kommandos*, THE ATLANTIC MONTHLY, Feb. 2002, at 52.

<sup>190</sup> *Id* at 50.

<sup>191</sup> LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 2 (Mar. 26, 2002). Gary Cohen, *The Keystone Kommandos*, THE ATLANTIC MONTHLY, Feb. 2002, at 52.

"he just arrived from Germany and planned to go to Washington, D.C., within a few days to talk to the FBI headquarters."<sup>192</sup> Dasch arrived in Washington, D.C. on June 18, 1942 and contacted the FBI.<sup>193</sup> "Dasch spoke with FBI special agents over the next five days."<sup>194</sup> By June 27, 1942, the FBI arrested all eight saboteurs.<sup>195</sup>

The FBI initially assumed that the saboteurs would be tried in civil court.<sup>196</sup> Two concerns arose over a trial in a civil court: an appropriate penalty and disclosure of the facts surrounding the capture of the saboteurs.<sup>197</sup> The maximum sentence for sabotage was thirty years.<sup>198</sup> The Government had doubts that they could secure a conviction because the saboteurs had not committed an act of sabotage.<sup>199</sup> Attorney General Francis Biddle concluded that an offense of attempted sabotage would not succeed in

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<sup>192</sup> LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 2 (Mar. 26, 2002).

<sup>193</sup> Gary Cohen, *The Keystone Kommandos*, THE ATLANTIC MONTHLY, Feb. 2002, at 53.

<sup>194</sup> *Id.*

<sup>195</sup> Sam Skolnik, *Death Sentences Behind Closed Doors*, LEGAL TIMES, Dec. 20, 1999, at 20.

<sup>196</sup> LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 3 (Mar. 26, 2002).

<sup>197</sup> *Id.* at 3-4.

<sup>198</sup> *Id.* at 4.

<sup>199</sup> *Id.*

civil court because "the preparations and landings were not close enough to the planned act of sabotage to constitute attempt."<sup>200</sup>

The other concern focused on national security. The FBI was praised in the press with having captured the saboteurs, when in reality, it was Dasch turning himself in that led to the arrest of the others.<sup>201</sup> "Also, the government did not want to broadcast how easily German U-boats had reached American shores undetected."<sup>202</sup> The government solved its concerns by using a secret military commission to try the saboteurs for offenses of violation of the law of war, violation of Articles 81 and 82 of the Article of War, and conspiracy to commit the offenses charged.<sup>203</sup>

The speed at which the government acted to charge, try, convict, review, and execute the saboteurs was incredible. The trial commenced on July 8, 1942,<sup>204</sup> only six days after President Roosevelt issued Presidential

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<sup>200</sup> *Id.*

<sup>201</sup> Louis Fisher, *Bush Can't Rely on the FDR Precedent*, LOS ANGELES TIMES, Dec. 2, 2001, at M3.

<sup>202</sup> LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 3 (Mar. 26, 2002).

<sup>203</sup> *Id.* at 8.

Proclamation 2561, Denying Certain Enemies Access To The Courts of the United States,<sup>205</sup> and Executive Order 9185, Appointment Of A Military Commission.<sup>206</sup> Challenging the validity and constitutionality of the military commission to try the saboteurs, the defense filed a writ of habeas corpus, which the United States District Court, District of Columbia, denied on July 28, 1942, at 8 p.m.<sup>207</sup> The U.S. Supreme Court, not in session for the summer, convened a Special Term on July 29, 1942,<sup>208</sup> and heard oral arguments at noon and throughout the next day.<sup>209</sup> On July 31, 1942, the Supreme Court, in a *per curiam* bench decision, upheld the jurisdiction of the military commission.<sup>210</sup> On August 8, 1942, the government executed six of the saboteurs.<sup>211</sup>

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<sup>204</sup> 317 U.S. 1 at 23 (1942); See also LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 8 (Mar. 26, 2002); and.

<sup>205</sup> 7 Fed. Reg. 5101 (1942).

<sup>206</sup> 7 Fed. Reg. 5103 (1942).

<sup>207</sup> LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 12 (Mar. 26, 2002).

<sup>208</sup> 317 U.S. 1 (1942).

<sup>209</sup> LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, ORDER CODE RL31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 12 (Mar. 26, 2002).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 15.

On October 29, 1942, the Supreme Court justified its oral decision with its written opinion in the saboteurs' case. The Court stated,

It is enough that petitioners here, . . . charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform - an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.<sup>212</sup>

The Court correctly held that the military commission had jurisdiction, but it incorrectly held that these particular acts constituted an offense against the law of war.

The Court erred when it stated that "[b]y passing our boundaries for such purposes [destroying war materials and utilities] without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishments."<sup>213</sup> To support its determination, the Court cited to Article 1, Annex to the Hague Convention IV of October 18, 1907, that

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<sup>212</sup> 317 U.S. 1 at 46 (1942).

<sup>213</sup> *Id.* at 37.

defined lawful belligerents.<sup>214</sup> By analogy, the Court said a lawful belligerent is entitled to POW status; therefore, the United States recognized a class of unlawful belligerents that is not entitled to POW status. The Court cited to the Lieber Code, Article 83, to support the view that a belligerent found disguised within the lines is a violation of the law of war.<sup>215</sup> Lastly, the Court cited to cases from the late 1700's and late 1800's of belligerents in disguises, specifically civilian dress, that were offenses of the law of war.<sup>216</sup>

The Court failed, however, to address Article 24 of the Hague Regulations that authorizes ruses in war "and the employment of measures necessary for obtaining information about the enemy and the country . . . ." <sup>217</sup> The Court failed to discuss Article 101, which acknowledges "deception in war is admitted as a just and necessary means of hostility, and is consistent with

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<sup>214</sup> *Id.* at 34.

<sup>215</sup> *Id.* at 32.

<sup>216</sup> *Id.* at 31.

<sup>217</sup> Hague Regulations, Art. 24, *supra* note 100. See also, Richard Baxter, *So-Called 'Unprivileged Belligerency' Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 330 (1951).



honorable warfare,"<sup>218</sup> so long as it is not an act of perfidy. The Court failed to consider or ignored that the saboteurs never obtained or endeavored to obtain information in the zone of operations, which is a critical element of being a spy.<sup>219</sup>

The cases the Court cited as examples of offenses against the law of war are distinguishable from the facts in the *Quirin* case because the offenders in those cited cases committed hostile acts or overt acts in furtherance thereby, allowing a successful conviction based on a charge of attempt. In the case of T.E. Hogg and others, charged and convicted with violation of the law of war, the men came aboard a ship in the port of Panama while disguised as "peaceful passengers"<sup>220</sup> to seize the ship for the Confederate forces. In another case, John Y. Beall was charged and convicted with violation of the laws of war when he came aboard a merchant ship at a Canadian port disguised in civilian dress and seized it.<sup>221</sup> Robert C.

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<sup>218</sup> LIEBER CODE, Art. 101, *supra* note 97. See also, Richard Baxter, *So-Called 'Unprivileged Belligerency' Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 331 (1951).

<sup>219</sup> Hague Regulations, Art. 29, *supra* note 100. See also Gary Cohen, *The Keystone Kommandos*, THE ATLANTIC MONTHLY, Feb. 2002, at 50 (saboteurs were to focus on establishing cover and refrain from any sabotage until further detailed instructions were to come on July 4).

<sup>220</sup> 317 U.S. 1 at 31 (1942).

<sup>221</sup> *Id.*

Kennedy was charged and convicted with a violation of the law of war for his attempt to set fire to the City of New York while in disguise.<sup>222</sup> William Murphy was charged and convicted with a violation of the law of war "for coming within the lines and burning a United States steamboat and other property."<sup>223</sup>

The distinction in the *Quirin* case is no hostile act was committed by any of the men, nor was any overt act committed in furtherance of the act of sabotage. The men merely landed on the coast, buried their uniforms and explosives, and checked into hotel rooms awaiting detailed instructions before commencing any act of sabotage. Although the law of war requires a lawful combatant to "have a fixed distinctive emblem recognizable at a distance,"<sup>224</sup> it does not expressly state failure to wear a uniform while crossing enemy lines is a violation. Today, a combatant who fails to distinguish himself while attacking or in preparation of attack, however, "shall forfeit his right to be a prisoner of war."<sup>225</sup>

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Hague Regulations, Art. 1, *supra* note 100.

<sup>225</sup> Additional Protocol I, Art. 44, para. 4, *supra* note 100.

## J. Prisoners of War

As a general rule, lawful combatants who fall into the hands of the enemy are entitled to POW status.<sup>226</sup>

Lawful combatants are individuals authorized by the parties to the conflict to engage in armed hostilities.<sup>227</sup>

For example the United States armed forces are lawful combatants because the United States, a party to the Geneva Conventions of 1949, authorizes them to engage in

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<sup>226</sup> Hague Regulations, Art. 3, "The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war." Geneva Convention III, Art. 4A,

Prisoners of war, in sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militia or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

Additional Protocol I, Art. 43, para. 2, "Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities. Additional Protocol I, Arts. 44, para. 1, "Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war." *supra* note 100.

<sup>227</sup> Additional Protocol I, Art. 43, para. 2, *supra* note 100.

armed hostilities, thereby being entitled to POW status. Al Qaeda, a non-state terrorist group and not a party to any of the international laws of war, are not lawful combatants, therefore, they have no POW status.<sup>228</sup>

A contentious issue, however, is the combatant and POW status of the Taliban militia. One view perhaps is that the Taliban militia are lawful combatants entitled to POW status because they were the armed forces, who exercised effective control of Afghanistan, as the *de facto* government.<sup>229</sup> The better view is that the Taliban militia are unlawful combatants not entitled to POW status because they are not and never claimed to be the Afghanistan government or its armed forces, and they were not recognized by the international community to be the Afghanistan government.<sup>230</sup>

"The armed forces of the belligerent parties . . . have a right to be treated as prisoners of war."<sup>231</sup> If there is any doubt as to whether an individual belongs to

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<sup>228</sup> See George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 A.J.I.L. 891, 893 (Oct. 2002)

<sup>229</sup> *Id.* at 895.

<sup>230</sup> W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms In the War on Terrorism*, U.S. NAV. WAR COLL. (forthcoming June 2003) (manuscript at 8, on file with author) ("The Taliban was never permitted to represent Afghanistan at the United Nations or in other international fora. The U.N. Security Council never recognized Taliban as the representative of Afghanistan.").

the categories entitled to POW status under Article 4 of the Geneva Convention III, the detaining party shall treat him as a POW until a competent tribunal determines his status.<sup>232</sup> Additional Protocol I of 1977 supplemented this with a presumption of POW status for individuals who take part in hostilities and are subsequently captured by the hostile party.<sup>233</sup>

The detaining power is responsible for the POW and must provide for humane treatment while holding him in custody.<sup>234</sup> There are two important benefits of being a POW. First, a combatant receives immunity for combat action conducted within the limits of the law of war, such as killing and destroying property, which otherwise would be criminal acts. Second, prisoners of war are accorded rights, namely "to be treated humanely and to be detained for no purpose other than to prevent them from rejoining the fight."<sup>235</sup>

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<sup>231</sup> Hague Regulations, Art. 3, *supra* note 100.

<sup>232</sup> Geneva Convention III, Art. 5, *supra* note 100.

<sup>233</sup> Additional Protocol I, Art. 45, *supra* note 100.

<sup>234</sup> Geneva Convention III, Arts. 12 and 13, *supra* note 100.

<sup>235</sup> Albert J. Esgain and Waldemar A. Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, 41 N.C. L. REV. 537, 538 (1963).

Because detention of prisoners of war is to prevent them from rejoining the fight, rather than punishment for fighting, prisoners of war enjoy other benefits when they are taken into custody. First, prisoners of war are no longer a lawful target.<sup>236</sup> Second, they may not be subjected to torture or medical or scientific experiments.<sup>237</sup> Third, prisoners of war are entitled "to respect for their persons and their honour."<sup>238</sup> Fourth, they are to be provided free of charge shelter, food, clothing, and medical care.<sup>239</sup> Fifth, prisoners of war are to be evacuated from the combat zone as soon as possible.<sup>240</sup> Sixth, they are allowed to worship freely.<sup>241</sup> Seventh, prisoners of war are permitted to send immediately upon capture letters directly to family informing them of their capture.<sup>242</sup> Additionally, a POW shall be allowed to send no "less [sic] than two letters

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<sup>236</sup> Hague Regulations, Art. 23(c) and Additional Protocol I, Art. 41, *supra* note 100.

<sup>237</sup> *Id.*

<sup>238</sup> Geneva Convention III, Art. 14, *supra* note 100.

<sup>239</sup> Geneva Convention III, Arts. 25, 26, 27, and 30, *supra* note 100.

<sup>240</sup> Geneva Convention III, Art. 19, *supra* note 100.

<sup>241</sup> Geneva Convention III, Art. 34, *supra* note 100.

<sup>242</sup> Geneva Convention III, Art. 70, *supra* note 100.

and four cards monthly,"<sup>243</sup> and is entitled to receive mail.<sup>244</sup>

Along with these benefits accorded a POW, he also has a general obligation to obey "the laws, regulations and orders in force in the armed forces of the Detaining Power."<sup>245</sup> The detaining power can hold a POW accountable through judicial or disciplinary proceedings for offenses committed by him against these laws, regulations and orders.<sup>246</sup>

The Geneva Convention III provides judicial procedural due process safeguards for prisoners of war accused of offenses. These safeguards are equivalent to a miniature Bill of Rights that accord protections for all prisoners of war who face prosecution.<sup>247</sup> An analogous *ex post facto* provision forbids the detaining power from trying or sentencing a POW for an act that was not forbidden by its laws or by international law.<sup>248</sup> Prisoners of war have a right against self-incrimination;

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<sup>243</sup> Geneva Convention III, Art. 71, *supra* note 100.

<sup>244</sup> *Id.*

<sup>245</sup> Geneva Convention III, Art. 82, *supra* note 100.

<sup>246</sup> Geneva Convention III, Art. 82, *supra* note 100.

<sup>247</sup> Geneva Convention III, Arts. 99 - 108, *supra* note 100.

<sup>248</sup> Geneva Convention III, Art. 99, *supra* note 100.

the detaining power may not use coercion to induce a POW to admit guilt.<sup>249</sup> A POW has a right to be informed of the specification of the charge or charges against him,<sup>250</sup> communicated to him in a language that he understands.<sup>251</sup> He is entitled to a prompt trial; however, there is no definition of what equates to a prompt trial.<sup>252</sup>

The Geneva Convention III has other safeguards to ensure a fair trial. A POW accused of a crime has the right to be represented by a "qualified advocate or counsel."<sup>253</sup> He has a right to call witnesses and is entitled to the services of a competent interpreter.<sup>254</sup> His defense counsel is granted time, at least two weeks before the trial begins for preparation, and a place to prepare for trial.<sup>255</sup> The preparation period, however, is actually longer because at trial the detaining power must offer evidence that the accused POW, his representative,

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<sup>249</sup> *Id.*

<sup>250</sup> Geneva Convention III, Art. 104, *supra* note 100.

<sup>251</sup> Geneva Convention III, Art. 105, *supra* note 100.

<sup>252</sup> Geneva Convention III, Art. 103, *supra* note 100.

<sup>253</sup> Geneva Convention III, Art. 105, *supra* note 100.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*



and the Protecting Power received notice of trial at least three weeks in advance.<sup>256</sup>

A POW who is convicted and sentenced to confinement receives credit for time served if he was placed into pre-trial confinement.<sup>257</sup> "He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so."<sup>258</sup> Sentences are enforceable after they are pronounced on the POW,<sup>259</sup> and the detaining power is authorized to detain the POW, even if hostilities have ended and the POW is designated for repatriation.<sup>260</sup> These are a few of the benefits accorded to prisoners of war. A spy, however, is not entitled to POW status, if captured while acting as a spy.<sup>261</sup>

#### **IV. Espionage and International Law**

Espionage is not prohibited under international law,<sup>262</sup> and neither is it a violation of the law of war,<sup>263</sup>

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<sup>256</sup> Geneva Convention III, Art. 104, *supra* note 100.

<sup>257</sup> Geneva Convention III, Art. 103, *supra* note 100.

<sup>258</sup> Geneva Convention III, Art. 106, *supra* note 100.

<sup>259</sup> Geneva Convention III, Art. 108, *supra* note 100.

<sup>260</sup> Geneva Convention III, Art. 115, *supra* note 100.

<sup>261</sup> Hague Regulations, Arts. 29 - 31, and Additional Protocol I, Art. 46, para. 1, *supra* note 100.

<sup>262</sup> Richard Baxter, *So-Called 'Unprivileged Belligerency' Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 329 (1951); Roger

rather it falls within legitimate ruses of war.<sup>264</sup> Article 24 of the Hague Regulations states, "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible."<sup>265</sup>

Spying is the secret collection of information by a person about a state with the intent to communicate the information to a party hostile to that state.<sup>266</sup> Secret collection means "acting clandestinely or on false pretenses, . . . ."<sup>267</sup> Additional Protocol I, Article 46(2), defined a spy in the negative stating a member of the armed force that "gathers or attempts to gather information shall not be considered as engaging in

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D. Scott, Commander, USN, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 217 (1999).

<sup>263</sup> International Committee of the Red Cross Commentary on the Additional Protocol, Art. 44, 540.

<sup>264</sup> Richard Baxter, *So-Called 'Unprivileged Belligerency' Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 330 (1951).

<sup>265</sup> Hague Regulations, Art. 24, *supra* note 100.

<sup>266</sup> LIEBER CODE, Art. 88, *supra* note 97, defined a spy as "a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy." The Hague Regulations, Convention IV, Respecting the Laws and Customs of War on Land, Art. 29, *supra* note 100, modified the definition by including the location of where the information is obtained: "in the zone of operations."

<sup>267</sup> Project of an International Declaration concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, Art. 19 [hereinafter Declaration of Brussels], reprinted in DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICT* 29 (2d rev. ed. 1981).

espionage if, while so acting, he is in the uniform of his armed forces."<sup>268</sup> Acting in the open, rather than acting with deception or in disguise, shields the individual from being labeled a spy.

The consequences for those caught spying can be harsh; historically it was death.<sup>269</sup> The individual who is caught and labeled a spy is subject to the domestic laws of the spied-on state. States impose severe punishments as a deterrent because it is difficult for states to defend themselves from acts of espionage.<sup>270</sup> The British captured Captain Nathan Hale, an American officer in the Revolutionary War, behind enemy lines disguised as a school teacher. The next day he was hanged.<sup>271</sup> Four years later, Major John Andre, a British officer, "was captured behind the American lines in civilian clothes and hanged as a spy."<sup>272</sup>

Under the law of war, a successful spy, defined as one who returns to his unit before being captured, is able

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<sup>268</sup> Additional Protocol I, Art. 46, para. 2 *supra* note 100.

<sup>269</sup> David A. Anderson, Major, USMC, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of its Mandatory Death Penalty*, 127 MIL. L. REV. 1 (1990).

<sup>270</sup> Geoffrey B. Demarest, Lt Col, *Espionage in International Law*, 24 DENV. J. INT'L. L. & POL'Y 321, at 331 (Spring 1996).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

to avoid the severe punishment.<sup>273</sup> "A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."<sup>274</sup>

Despite the severe punishments for espionage under domestic state laws, "intelligence activities are now accepted as a common, even inherent, attribute of the modern state."<sup>275</sup> Spying is a standing practice of states. Collection of information occurs daily through observations by people, such as diplomats, through electronic eavesdropping by ships off coastal states, and through surveillance by aircraft and satellites. "[C]overt operations have been widely carried out by Western intelligence services"<sup>276</sup> and "occur with a high rate of frequency."<sup>277</sup>

Consequences of espionage in peace are not as severe as in war. A diplomat accused of espionage is declared

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<sup>273</sup> LIEBER CODE, Art. 104, *supra* note 97, and the Hague Regulations, Art. 31 *supra* note 100.

<sup>274</sup> Hague Regulations, Art. 31, *supra* note 100.

<sup>275</sup> Geoffrey B. Demarest, Lt Col, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321, at 321 (Spring 1996).

<sup>276</sup> Loch K. Johnson, Article: *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT'L L. 284, 292 (Apr. 1992). Table of reported Western Intelligence Operations Since 1945.

*persona non grata* and sent home.<sup>278</sup> A ship accused of eavesdropping while in territorial waters of a coastal state loses its right of innocent passage<sup>279</sup> and may be required to depart.<sup>280</sup> An airplane and aircrew accused of spying were briefly detained but ultimately were released.<sup>281</sup>

These acts of espionage are no more dangerous to the hostile state spied on than missions conducted by SOF wearing nontraditional uniforms in a hostile state. The probability, however, is extremely high that the hostile state that captures SOF in nontraditional uniforms will accuse them of being spies.

Surveillance by SOF provide critical information leading to successful missions. SOF special reconnaissance missions may occur through the insertion of small teams in nontraditional uniforms who gather information to help shape the battlefield before the

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<sup>277</sup> *Id.* at 284.

<sup>278</sup> Vienna Convention on Diplomatic Relations, 1961, 22 U.S.T. 3227; T.I.A.S. 7502; 500 U.N.T.S. 95 Art. 9.

<sup>279</sup> United Nations Convention on the Law of the Sea, adopted Dec. 10, 1982, 1833 U.N.T.S. 3, Art. 19(2)(c) [hereinafter Law of the Sea].

<sup>280</sup> Law of the Sea, Art. 25(1), *supra* note 279.

<sup>281</sup> United States Navy EP-3E detained by the China on Apr. 1, 2001, and the aircrew was released Apr. 11, 2001, available at [http://www.chinfo.navy.mil/navpalib/news/news\\_stories/ep3-china-06.html](http://www.chinfo.navy.mil/navpalib/news/news_stories/ep3-china-06.html) (last visited June 20, 2003).

commencement of hostilities. These covert SOF missions have severe implications if SOF are captured wearing nontraditional uniforms.

A detaining power arguably could declare under these circumstances that the captured SOF are spies denying them POW status,<sup>282</sup> subjecting them to trial for espionage, and exposing them to a death sentence. The question presented by the scenario is what protection, if any, is accorded to spies.

A literal reading of Article 4 of the Geneva Convention IV seems to indicate that a spy is a protected person in the convention.<sup>283</sup> The issue is clarified in Article 5 of the convention, which denies the rights and privileges of the convention to individual protected persons "suspected of or engaged in activities hostile to the security of the State, . . . ."<sup>284</sup> The action of the United States denying POW status to members of al Qaeda in the armed conflict in Afghanistan illustrates a category of persons, illegal combatants, not protected under the

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<sup>282</sup> Hague Regulations, Arts. 29 - 31, and Additional Protocol I, Art. 46, para. 1, *supra* note 100.

<sup>283</sup> Richard Baxter, *So-Called 'Unprivileged Belligerency' Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 328 (1951).

<sup>284</sup> Geneva Convention IV, Art. 5, *supra* note 100; Richard Baxter, *So-Called 'Unprivileged Belligerency' Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 328 (1951).

law of war.<sup>285</sup> Although the United States denied them POW status, they are entitled to humane treatment under customary international law.<sup>286</sup>

## **V. Analysis**

The aim of the law of war is to make war more civilized and facilitate the restoration of peace. The law of war recognizes three groups: combatants, non-combatants and civilians. Combatants are authorized to participate directly in armed hostilities, whereas non-combatants and civilians are not. Combatants must distinguish themselves from civilians, so the latter are not made the object of military attacks.

Wearing traditional uniforms is one way to distinguish combatants from the civilian population, but the law of war does not expressly require uniforms to be worn. What is required by the law of war, whether members of the armed forces of a State or militia or volunteer corps, is that combatants are commanded by a person responsible for his subordinates, have a fixed and

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<sup>285</sup> George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 at 892 (Oct. 2002).

<sup>286</sup> *Id.* at 893.

distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the laws and customs of war.<sup>287</sup>

SOF are organized, trained, and equipped combatants called on to execute special missions that require a low profile to avoid escalation, or to get in and get out of enemy territory without detection. During these missions, SOF may not be wearing traditional uniforms so as to conceal their movements and avoid detection while in enemy territory. Their small size also allows SOF to avoid detection as compared with a large conventional force. Their training in unconventional operational methods, such as night HALO or HAHO parachute jumps, facilitates SOF infiltration into hostile or denied areas without being detected. Their equipment consists of highly modified aircraft with sophisticated radars, avionics, and sensors that allow SOF to conduct all-weather operations, especially night operations, to conceal their missions.

Threats to the national security of the United States often cannot be resolved through the political, economic, and diplomatic instruments of national power. When that happens, use of the armed forces may be the only option.

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<sup>287</sup> Hague Regulations, Art. 1, and Geneva Convention III, Art. 4 *supra* note 100.



Arrival of the conventional armed forces at times is enough to persuade a force threatening the United States to back down from its hostile posture. Risks of escalation of hostilities might make it inappropriate to deploy the conventional armed forces, or the mission could be too sensitive or beyond their capabilities. The solution is to deploy SOF.

SOF are authorized by statutes to perform special activities when tasked by the President. Congress delegated to the President power to authorize the conduct of covert action when the President determines it "necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States, . . . ." <sup>288</sup> Although SOF are authorized to conduct these special missions, the law of war implication to SOF who are captured by the enemy carries serious consequences if they are declared to be spies.

States have employed spies for centuries and regularly engaged in covert operations to provide intelligence on the intentions and capability of their adversaries. Methods of intelligence collection may occur from outside the territory of a state spied on through the

use of satellites. When intelligence collection occurs in the territory of the state spied on, the violation amounts to a trespass.

International conventions or treaties do not prohibit espionage.<sup>289</sup> The Hague Regulations of 1907, Article 24, recognizes "[r]uses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible."<sup>290</sup> The Lieber Code recognizes that "deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare,"<sup>291</sup> so long as there is no clandestine or treacherous attempt to injure the enemy. State practice supports the proposition that wearing nontraditional uniforms in international armed conflict is permissible.<sup>292</sup> Even a successful military spy, defined as one who returns to his armed forces and is subsequently

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<sup>288</sup> 50 U.S.C. § 413b(a) (2003).

<sup>289</sup> Roger D. Scott, Commander, USN, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 218 (1999).

<sup>290</sup> Hague Regulations, Art. 24, *supra* note 100.

<sup>291</sup> LIEBER CODE, Art. 101, *supra* note 97.

<sup>292</sup> W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms In the War on Terrorism*, U.S. NAV. WAR COLL. (forthcoming June 2003) (manuscript at 15-20, on file with author).

captured, is rewarded with POW status under the law of war.<sup>293</sup>

Combatants falling into the hands of their adversaries are accorded POW status under the law of war, entitled to protection by the detaining power. Two important benefits of being a POW are (1) the combatant immunity for his combat action conducted within the limits of the law of war, which otherwise would be criminal acts, and (2) that the detaining power must treat prisoners of war humanely.

SOF are members of the United States armed forces<sup>294</sup> authorized to participate in armed hostilities. The law of war defines those who are authorized to participate in armed hostilities as combatants. Thus, SOF are lawful combatants. Lawful combatants who fall into the hands of the enemy are prisoners of war. Therefore, SOF who fall into the hands of the enemy are prisoners of war.

SOF should be entitled to POW status even though they are captured wearing nontraditional uniforms because their nontraditional uniforms are distinct from clothing worn by civilian populations, thereby resulting in no increased risk of attack on civilians. SOF carry their arms openly,

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<sup>293</sup> Hague Regulations, Art. 31, *supra* note 100.

<sup>294</sup> 10 U.S.C. § 167

and their specialized combat equipment is also distinct from weapons found in civilian populations. SOF have a chain of command responsible for subordinates, and SOF conduct operations in compliance with the laws and customs of war.<sup>295</sup> Militia members and volunteer corps captured while not wearing uniforms are accorded POW status if they are commanded by someone responsible for subordinates, have a fixed distinctive emblem recognizable at a distance, carry their arms openly, and conduct operations in compliance with the laws and customs of war.<sup>296</sup> If the militia and volunteer corps have POW status, despite not wearing uniforms, SOF meeting these four criteria should have POW status too if captured wearing nontraditional uniforms. Therefore, missions conducted by SOF in nontraditional uniforms satisfy requirements of combatants entitled to POW status under the law of war.

Spies falling into the hands of their adversaries, however, risk forfeiture of their POW status. History is filled with cases of charges of espionage, trials, convictions and executions of spies. The United States

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<sup>295</sup> The policy of the Department of Defense is that the armed forces are required to comply with the law of armed conflict, unless otherwise directed by competent authorities. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 5810.01B, *Implementation of the DOD Law of War Program*, Mar. 25, 2002.

<sup>296</sup> Hague Regulations, Arts.1 and 3, *supra* note 100.

Supreme Court, in *Ex Parte Quirin*,<sup>297</sup> upheld the jurisdiction of the military commission that tried, convicted, and executed German saboteurs charged with espionage, sabotage, conspiracy, and violation of the law of war. In a rushed decision, the Supreme Court failed to recognize the law of war provisions on authorized ruses and deceptions in war. The Court failed to distinguish the law of war violation cases it cited to support the holding in the *Quirin* case. Perhaps these oversights would have been addressed had the Court not rushed to issue a decision from the bench immediately after two days of oral argument.

A comparison of the trial of Colonel Skorzeny with today's SOF supports the proposition that SOF are not spies and should be protected under the law of war. The 150<sup>th</sup> Panzer Brigade was organized as a small group of highly trained and equipped German armed forces to conduct a special mission behind enemy lines. They studied American language and culture. They disguised themselves by wearing American uniforms. They infiltrated behind enemy lines as force multipliers for the conventional armed forces by creating chaos and confusion among the Allies. When captured by the Allies, they were not

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<sup>297</sup> 317 U.S. 1 (1942)

labeled as spies and tried for the offense of espionage, nor were they charged with violation of the law of war as the German saboteurs were in *Quirin*.<sup>298</sup> The Allies charged them with the offense of improper use of enemy uniforms, and all were acquitted.

SOF are small groups of highly trained and equipped armed forces. They study foreign languages and receive regional cultural awareness orientation. On occasion, they disguise themselves by not wearing traditional uniforms. They infiltrate behind enemy lines as force multipliers for the conventional armed forces to create chaos and confusion. Like Colonel Skorzeny and his troops, SOF captured by the enemy should be treated as prisoners of war and should not be labeled as spies and tried for the offense of espionage.

## **VI. Conclusion**

SOF are vital to the national defense of the United States, and the role they play today strongly indicates the United States will place greater emphasis on them tomorrow. Due to the length of time required to train SOF and their high attrition in training, SOF cannot be

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<sup>298</sup> 317 U.S. 1 (1942)

developed and created overnight. SOF increase the effectiveness and efficiency of the conventional armed forces, and are ideally suited to conduct missions that the conventional armed forces are not able to perform because of their unique organization, training, and equipment. Therefore, SOF should be accorded all the protections in the law of war accorded the conventional armed forces.

One unique SOF characteristic is the nontraditional uniforms that on exceptional circumstances may be worn. An initial glance at the law of war, may lead one to the conclusion that members of the regular armed forces not dressed in traditional uniforms captured by the enemy are not entitled to POW status and risk being called a spy. Examining the law of war in detail, however, demonstrates there is no requirement to wear a uniform to be accorded POW status.

SOF conducting special missions dressed in nontraditional uniforms should be accorded POW status if captured; however, there are limits to their operations. It is not a violation of the law of war to use camouflage and ruses, and engage in espionage in military operations. For instance, the combat controllers in Afghanistan wearing nontraditional uniforms have not committed perfidy

by providing coordinates for aircraft to drop bombs because use of nontraditional uniforms only camouflages the combat controllers, rather than causing the enemy into a false belief he is protected from aircraft bombs.

SOF using a disguise, however, to blend in with civilian populations gaining an advantage that proximately causes the killing, injuring, or capturing the enemy is perfidy, a violation of the law of war. An illustration of perfidy is the tactics, feigning civilian status, used by the Fedayeen during Operation Iraqi Freedom to attack United States armed forces. Combatants using disguises that do not result in feigning civilian or non-combatant status to kill, wound, or capture, are permissible in the law of war.

There is no requirement in the law of war that combatants must wear a uniform, rather the requirement is that combatants must distinguish themselves from civilians so that civilian populations are not placed at risk of attack. The ICRC Commentary on the Additional Protocol I and other scholars, recognized circumstances where regular armed forces are not required to wear uniforms. State practice, which forms a basis for determining customary



international law, demonstrates wearing of nontraditional uniforms in military operations from 1904 to 1991.<sup>299</sup>

Clearly the best way to observe the law of war, avoiding risks to civilians from being attacked and losing POW status for SOF is for SOF to wear traditional uniforms. Reviewing the details of the law of war and the details of the military operations, however, demonstrates there are circumstances that wearing nontraditional uniforms do accord POW status for SOF.

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<sup>299</sup> W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms In the War on Terrorism*, U.S. NAV. WAR COLL. (forthcoming June 2003) (manuscript at 15-20, on file with author).